

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

ROBERT DOUGLAS,

Plaintiff,

v.

MICHAEL SMELOSKY et al.,

Defendants.

CASE NO. 3:10-cv-1464-GPC-BGS

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR ATTORNEY'S  
FEES**

[ECF No. 105]

Before the Court is Plaintiff's October 13, 2015 motion for attorney's fees. Pl. Mot., ECF No. 105. The motion has been fully briefed. Def. Opp., ECF No. 106; Pl. Reply, ECF No. 107. Upon consideration of the moving papers and the applicable law, the Court **GRANTS** Plaintiff's motion for attorney's fees.

**BACKGROUND**

Plaintiff Robert Douglas, a state prisoner, originally filed a complaint against Defendants Smelosky, Walker, and Valenzuela, state prison officials and officers, on July 12, 2010. Compl. 1–2, ECF No. 1. The Plaintiff asserted a 42 U.S.C. §1983 cause of action for cruel and unusual punishment under the Eighth Amendment for actions allegedly taken by the Defendants during a search of his cell. Compl. 3. After the case partially survived a motion to dismiss, ECF No. 18, and a motion for summary judgment, ECF No. 71, with a single named Defendant (Defendant Valenzuela), attorney David Zugman was appointed as pro-bono counsel for

1 Plaintiff per the Court's direction on September 3, 2014, ECF No. 81. Attorney  
2 Zugman entered his appearance on September 25, 2014.

3 On October 22, 2014, parties appeared at a mandatory settlement conference  
4 before Magistrate Judge Skomal. ECF No. 88. On October 31, 2014, parties agreed  
5 to settle the case for \$10,000 at a follow-up settlement conference before the  
6 Magistrate Judge. Transcript of Oct. 31, 2014 Settlement Conference ("Transcript")  
7 at 2–4, ECF No. 98. No mention was made of attorney's fees during this settlement  
8 conference. *See generally id.* On November 5, 2014, Defendant's counsel proffered  
9 a settlement agreement which included an attorney fees waiver. Feb. 3, 2015 Order  
10 Granting Motion to Compel Settlement Agreement ("Settlement Order") 2, ECF No.  
11 97. In response, Plaintiff filed a motion to compel the Defendant to provide a  
12 settlement agreement without an attorney fees waiver on December 5, 2014. *Id.* In  
13 their opposition to Plaintiff's motion, Defendant argued that prefatory remarks made  
14 by Plaintiff's counsel in the initial October 22, 2014 settlement conference  
15 regarding a waiver of attorney's fees were part of the agreement. *Id.* at 3. However,  
16 the Magistrate Judge ruled in favor of the Plaintiff, finding that a statement made by  
17 counsel at the outset of settlement negotiations did not constitute a "clear and  
18 unambiguous" attorney fees waiver as required under Ninth Circuit precedent. *Id.*  
19 The Magistrate Judge accordingly ordered the Defendant to produce a settlement  
20 agreement that did not include an attorney fees waiver. *Id.* at 4.

21 On February 13, 2015, Defendant gave the Court notice of his compliance  
22 with the Magistrate Judge's Settlement Order. ECF No. 99. On September 30, 2015,  
23 the Court approved the parties' joint stipulation to dismiss the case with prejudice.  
24 ECF No. 104. On October 13, 2015, Attorney Zugman filed the motion for  
25 attorney's fees. ECF No. 105. On November 20, 2015, Defendant responded. ECF  
26 No. 106. On November 27, 2015, Plaintiff replied. ECF No. 107.

### 27 LEGAL STANDARD

28 42 U.S.C. § 1988(b) provides that a court, "in its discretion, may allow the

1 prevailing party, other than the United States, a reasonable attorney's fee as part of  
 2 the costs" "[i]n any action or proceeding to enforce a provision" of various federal  
 3 civil rights statutes, including 42 U.S.C. §1983. "[T]o qualify as a prevailing party,  
 4 a civil rights plaintiff must obtain at least some relief on the merits of his claim. The  
 5 plaintiff must obtain an enforceable judgment against the defendant from whom fees  
 6 are sought, or comparable relief through a consent decree or settlement." *Farrar v.*  
 7 *Hobby*, 506 U.S. 103, 111 (1992) (citations omitted). In a civil rights action,  
 8 reasonable attorney's fees are calculated using the "lodestar" approach, which  
 9 multiplies the number of hours reasonably expended on the litigation times a  
 10 reasonable hourly rate. *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989) (citing  
 11 *Hensley v. Eckerhart*, 461 U.S. 424 (1983)).

## 12 DISCUSSION

13 Plaintiff requests \$14,900.00 in attorney's fees and \$283.00 in costs for  
 14 printing, postage, and legal research fees. Pl. Mot. 10. Plaintiff's counsel states that  
 15 he spent 94.6 hours litigating this case. *Id.* Plaintiff's counsel states that he has over  
 16 18 years of legal experience and has billed \$300.00/hour in other civil rights cases,  
 17 Zugman Decl. 1–3, ECF No. 105, but that the Prison Litigation Reform Act  
 18 ("PLRA"), 42 U.S.C. § 1997(e)(d), caps the hourly rate at \$190.50/hour, and the  
 19 total award of attorneys fees to 150% of the judgment, i.e. \$15,000, Pl. Mot. 8  
 20 (citing *Dannenberg v. Valadez*, 338 F.3d 1070 (9th Cir. 2003)). Thus, even though  
 21 Plaintiff's counsel would otherwise collect \$18,021.30 at the PLRA hourly rate, the  
 22 cap for attorney's fees here is \$15,000. Subtracting \$100 as contribution from  
 23 Plaintiff Douglas, Plaintiff's counsel requests \$14,900. Pl. Mot. 10.

24 Defendant makes three arguments against the award of attorney's fees: (1) the  
 25 Plaintiff should not be considered a prevailing party; (2) Plaintiff's counsel waived  
 26 attorney's fees during the settlement negotiations; and (3) the amount requested is  
 27 excessive. The Court finds each rationale unpersuasive, for the reasons discussed  
 28 below.

1 First, Defendant argues that the Plaintiff should not be considered a  
2 prevailing party because the parties settled the case, and for what the Defendant  
3 characterizes as a “nuisance” amount. Def. Opp. 5–6. Defendant relies on  
4 *Buckhannon Bd. of Care Home, Inc. v. West Va. Dep’t of Health & Human*  
5 *Resources*, 532 U.S. 598 (2001), to support the proposition that a plaintiff cannot be  
6 the “prevailing party” where there is a settlement. Def. Opp. However, Defendant’s  
7 reliance on *Buckhannon* is misplaced. In *Buckhannon*, a lawsuit concerning  
8 allegedly inadequate assisted living homes, the Supreme Court declined to adopt  
9 plaintiffs’ “catalyst theory,” whereby a plaintiff should be understood as a  
10 prevailing party where a lawsuit brings about a *voluntary* change in a defendant’s  
11 conduct. *Buckhannon*, 532 U.S. at 602. In that case, the district court dismissed the  
12 case as moot after two bills enacted by the West Virginia legislature eliminated the  
13 statutory requirements for assisted living homes that were at issue for the case. *Id.* at  
14 601. Following the dismissal of the case, plaintiffs sought attorney’s fees as the  
15 “prevailing party.” *Id.* The Supreme Court rejected the argument that the lawsuit  
16 acting as the “catalyst” for the new legislation meant that the plaintiffs should be  
17 understood as the “prevailing party” for the purposes of the Fair Housing  
18 Amendments Act of 1988’s (“FHAA”) attorney’s fees provision. *Id.* at 603.  
19 However, the majority, concurrence, and dissent all agreed that the Court’s holding  
20 in *Buckhannon* did not disturb the Court’s longstanding judgment that there can be  
21 a prevailing party in a settlement agreement. *See id.* at 602, 604, 609; *see also id.* at  
22 618 (Scalia, J., concurring); *id.* at 622 (Ginsburg, J., dissenting).

23 The Defendant also argues that Plaintiff is not a prevailing party because the  
24 settlement was for a “nuisance” amount. Def. Opp. 6 (“Defendant admitted no  
25 liability, the settlement amount was less than what Defendant anticipated as the cost  
26 of re-opening discovery and going to trial would cost, and it was far below  
27 Plaintiff’s earlier six-figure demands.”). It is true that although a plaintiff who wins  
28 nominal damages is a prevailing party under § 1988, the fact that the plaintiff was

1 awarded only nominal damages does bear on the reasonableness of a fee  
2 award. *Farrar*, 506 U.S. at 112–14; *see also Texas State Teachers Ass’n v. Garland*  
3 *Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (observing that “[w]here the plaintiff’s  
4 success on a legal claim can be characterized as purely technical or de minimis,”  
5 plaintiff is not a prevailing party under § 1988). However, here, it cannot be said  
6 that a \$10,000 judgment is a nominal amount. The Ninth Circuit has approved  
7 reasonable attorney’s fees where the settlement amount was comparable to that at  
8 issue here. *See, e.g., Quesada v. Thomason*, 850 F.2d 537, 540 (9th Cir. 1988)  
9 (reversing the reduction of attorney’s fees in § 1983 case where the settlement  
10 amount was \$17,500); *see also Darby v. City of Torrance*, 1995 WL 23588, at \*2–3  
11 (9th Cir. Jan. 20, 1995) (rejecting defendant’s arguments that the settlement amount  
12 was too small and plaintiff was not prevailing party in § 1983 case where the  
13 settlement amount was \$11,000).

14       Second, Defendant argues that it would be unfair to award attorney’s fees to  
15 Plaintiff because Plaintiff’s counsel represented that he would not seek attorney’s  
16 fees during the initial settlement conference. Def. Opp. 7. This argument was  
17 considered and rejected Magistrate Judge Skomal in his February 3, 2015  
18 Settlement Agreement Order directing the Defendant to produce a settlement  
19 agreement that did not include an attorney fee waiver. The Magistrate Judge found  
20 that a statement made by counsel at the outset of settlement negotiations did not  
21 constitute a “clear and unambiguous” fee waiver as required under Ninth Circuit  
22 precedent. Settlement Order 3 (citing *Erdman v. Cochise Cnty., Ariz.*, 926 F.2d 877,  
23 880 (9th Cir. 1991)). The Court agrees with Judge Skomal. Reviewing the transcript  
24 of the October 31, 2014 Settlement Conference, Judge Skomal clearly stated that the  
25 material terms of the settlement agreement were: (1) payment of \$10,000; and (2)  
26 dismissal of the case with prejudice, and repeatedly asked the parties whether they  
27 understood that all the material terms of the settlement were detailed by Judge  
28 Skomal. *See* Transcript at 2–4. While Defendant’s counsel added their

1 understanding that the settlement amount would be subtracted by any restitution  
2 owed by Plaintiff and that they required a “signed payee data form” from the  
3 Plaintiff, no mention was made by any party of any attorney fee waiver or lack  
4 thereof. *See id.* at 2–6. If Defendant wanted an attorney fee waiver included in the  
5 settlement agreement, it was his responsibility, not Plaintiff’s, to ensure that the  
6 waiver was included as a material term during the final settlement conference.

7 Third, Defendant argues that the fees requested by Plaintiff’s counsel are  
8 excessive. Def. Opp. 9. Defendant argues that Plaintiff’s counsel’s role in the case  
9 was “miminal,” since he was brought in after the summary judgment stage, that 39.8  
10 of the 94.6 hours was incurred after the settlement was reached on October 31,  
11 2014, and that some of the fees reported may not be involving this case. Def. Opp.  
12 9–11.

13 Upon review of the record, the Court disagrees that Plaintiff’s counsel’s role  
14 in this case was “minimal.” While it is true that Plaintiff’s counsel was only brought  
15 on after the summary judgment stage, his appointment on September 3, 2014  
16 facilitated the settlement of a case that had been proceeding in litigation for over  
17 four years. Of the 54.8 hours billed prior to settlement on October 31, 2014, all  
18 appear to be for reasonable attorney work product related to the case. Plaintiff’s  
19 counsel did incur an additional 39.8 hours of work following the final settlement  
20 conference on October 31, 2014, but only, it appears, because Defendant contested  
21 whether attorney’s fees were waived at the settlement conference, necessitating  
22 Plaintiff’s counsel to file an additional motion to compel before the Magistrate  
23 Judge. Finally, even if 1.3 hours Defendant identifies as potentially irrelevant were  
24 removed, Plaintiff’s counsel would still have billed 93.3 hours for the case, which at  
25 the PLRA specified rate of \$190.50/hour, would at \$17,773.65 still exceed the  
26 \$14,900 Plaintiff’s counsel is requesting.

### 27 CONCLUSION

28 For the foregoing reasons, Plaintiff’s request for attorney’s fees and costs,

1 ECF No. 105, is **GRANTED**. Plaintiff is awarded \$14,900 in attorney's fees and  
2 \$283.00 in costs.

3 **IT IS SO ORDERED.**

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5 DATED: December 3, 2015

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7 HON. GONZALO P. CURIEL  
8 United States District Judge  
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